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UNITED STATES

v.

SALIM AHMED HAMDAN

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)  
) DEFENSE REQUEST FOR  
) WITNESS IN MOTION HEARING  
) ON UCMJ/MILITARY LAW:  
) JORDAN PAUST  
)  
) 18 October 2004  
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1. Witness Request – Jordan Paust – U.S. v. Hamdan.

2. Jordan Paust is a professor at University of Houston Law School. His address is XXXX. His telephone number is XXXX. His e-mail is [XXXX](#). He speaks English.

3. Jordan Paust is the nation's preeminent expert on American military law and its relationship to military commissions. He has published widely in the field. Professor Paust also examined the constitutionality and legality of military commissions on behalf of the American military when he served as a JAG officer. He will explain why the Military Commission in this case is not properly constituted and void.

4. Civilian Defense Counsel has spoken with Professor Paust and has read his publications and legal brief mentioned in paragraph 3.

5. The testimony of Professor Paust is to be used for Mr. Hamdan's motion regarding Lack of Legislative Authority (D20) and Article 10 of the UCMJ (D21). It may also be referenced in the Defense Motion for Abatement (D16).

6. Civilian Defense Counsel had e-mail communication with Professor Paust on 8 October 2004, and Professor Paust indicated that he will be telephonically available only during the dates of Mr. Hamdan's motions.

7. Civilian Defense Counsel believes that the Commission would greatly benefit from the live testimony of Professor Paust, as the leading expert in American military law. However, due to Professor Paust's inability to be present in person due to an already planned trip to Germany, we will accept his testimony telephonically, though we realize that it is an inferior substitute.

8. No other witness can be called to attest to the relationship between American military justice and military commissions. Professor Paust is the leading expert in the field.

9. This is an expert witness request. His views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire Commission against the influence of the sole member of the Commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the

commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the Commission is essential to providing the full commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

NEAL KATYAL  
Civilian Defense Counsel

Attachments:

1. Defense Request for Expert Witness – Jordan Paust – 11 Oct 04
2. Defense Response to Prosecution Motion Barring Expert Witnesses, 14 Oct 04

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) DEFENSE REQUEST FOR  
) WITNESS IN MOTION HEARING  
) ON UCMJ/MILITARY LAW AND  
) ABATEMENT:  
) JORDAN PAUST  
)  
) 11 October 2004  
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1. Witness Request – Jordan Paust – U.S. v. Hamdan.
2. Jordan Paust is a professor at University of Houston Law School. His contact information is set forth on his curriculum vitae, which has already been provided to the commission.
3. Jordan Paust is the nation's preeminent expert on American military law and its relationship to military commissions. He has published widely in the field. Professor Paust also examined the constitutionality and legality of military commissions on behalf of the American military when he served as a JAG officer. He will explain why the Military Commission in this case is not properly constituted and void.
4. Civilian Defense Counsel has spoken with Professor Paust and has read his publications.
5. The testimony of Professor Paust is to be used for Mr. Hamdan's motion regarding Separation of Powers and Article 10 of the UCMJ and Abatement.
6. Civilian Defense Counsel had e-mail communication with Professor Paust on 8 October 2004, and Professor Paust indicated that he will be telephonically available only during the dates of Mr. Hamdan's motions.
7. Civilian Defense Counsel believes that the Commission would greatly benefit from the live testimony of Professor Paust, as the leading expert in American military law. However, due to Professor Paust's inability to be present in person due to an already planned trip to Germany, we will accept his testimony telephonically, though we realize that it is an inferior substitute.
8. No other witness can be called to attest to the relationship between American military justice and military commissions. Professor Paust is the leading expert in the field.
9. This is an expert witness request. His views are authoritative on the questions raised in these motions. They can also serve as a ballast for the entire Commission against the influence of the sole member of the Commission who has a law degree. We do not mean to suggest that that individual is likely to rule one way or the other, rather, we simply point out that providing the commission with access to the leading law professors with expertise in the world on the complicated legal questions that are before the Commission is essential to providing the full

commission with the information necessary to make an informed decision. In this respect, the commission is similar to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. Without access to these witnesses, a tremendous risk exists that the commission will not reach a full and fair judgment of law.

10. We submit no other matters for your consideration.

Neal Katyal  
Civilian Defense Counsel

Note:

The Defense also included its reply to the Prosecution Motion to Barring Expert witnesses.

A copy of that document is the same as Motions Inventory number P8 and is also an attachment to Motions Inventory D24.

The document referred to above has been removed from this file solely for purposes for economy and because it is already a part of the record.

XXXX

Assistant to the Presiding Officer.

## **D29 Hamdan Defense Supplement to synopsis - Paust. 22 Oct 04**

Please find, as per your request, a more detailed synopsis of the testimony. The synopsis also explains why live testimony is important, from the witness's perspective. I have separately, in our motion under POM #10, explained why we believe the witness' testimony is important from the perspective of the Defense, including the need to ensure that the Presiding Officer does not unduly influence the proceedings as the only lawyer. These concerns are at their height given the decision today by the appointing authority to reduce the size of the commission to three members, meaning that the spectre of undue influence by the Presiding Officer (which would, as we have said, be unintentional yet predictable) is at its height.

We note that the Prosecution, here and elsewhere, has cited literally no authority to bar the testimony of experts who inform about the law (let alone the history behind the law) when the body deciding the matter are not all judges trained in the law and selected as such. The International Tribunals for Yugoslavia and Rwanda are staffed by expert judges, with rules set up by the international community in advance. In this respect, the military commission has virtually nothing in common with them, or with the domestic court system. Those other tribunals had the advantage of experts in the drafting of the offenses and procedures for trial and a far more transparent system. And because they have judges trained in the law, there is not nearly the same need to educate them about what the law is. None of that is true here. For that reason, expert witnesses are not only important, but essential. To exclude the leading figures in the nation on these questions will eviscerate the credibility of the commissions.

### **Synopsis of Testimony by Professor Jordan J. Paust**

First, by way of introduction, I will address the nature of the war in Afghanistan after October 7, 2001 for the purpose of demonstrating why it is an international armed conflict between the United States and the members of the armed forces of the Taliban and why, therefore, all of the customary laws of war and the Geneva Conventions are applicable.

Second, I will address why the military commissions at Guantanamo do not have jurisdiction (1) since they are not located within a theater of war or within a war-related occupied territory, and (2) since they are created with an inherent violation of the separation of powers in that they do not comply with the mandate in Article I, Section 8, clause 9 of the United States Constitution. This, in conjunction with the first point, means that the commission must be dismissed because it is improperly constituted and therefore void. That is what I expect to spend the bulk of my testimony discussing. My testimony is relevant because I believe that the commission against Mr. Hamdan must be dismissed.

Some of this is addressed in various law review publications, but none with all of the needed detail and with explanations why some of the now-disclosed previously secret

DOJ and White House memos to the contrary are incorrect. This is why I need to testify, because I have not published all of this.

As a former CPT, JAG and member of the faculty of TJAG School (1969-1973, and Mobilization Designee at TJAG School 1973-1975), I will add insight into the efforts to draft a military commission during that time period with many needed due process guarantees for prosecution of war crimes, and the applicability of the UCMJ. My view is that the constitutional and military law questions in the Hamdan case are integrally linked together. Both the Constitution and the UCMJ explain why the commission is improperly constituted and void.

I will also be able to address some of the applicable customary laws of war; why common Article 3 of the Geneva Conventions is among the customary laws of war applicable during an international armed conflict; why common Article 1 of the Geneva Conventions precludes claims to deny protections, including due process guarantees, on the basis of alleged necessity, reciprocity, reprisals, or the alleged status of persons detained; why members of the armed forces of the Taliban are prisoners of war under GPW Article 4(A)(1) and (3); why persons detained during the war in Afghanistan (or Iraq) who are not prisoners of war are nonetheless entitled to protections under common Article 3 of the Geneva Conventions, applicable provisions of the Geneva Civilian Convention, and the customary law of war mirrored in Article 75 of Protocol I to the Geneva Conventions.

I will also address why the President's Military Order of November 13, 2001 does not comply and why the present DOD Rules of Procedure set forth in Military Commission Order No. 1 do not comply and why certain rules violate the law.

## CURRICULUM VITAE

**JORDAN J. PAUST**

Phone: XXXX

Fax: XXXX

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### Education

University of California at Los Angeles

A.B. (1965) (History, Honors)

U.C.L.A. Debate Team

University of California at Los Angeles

J.D. (1968)

#1 Torts

#1 Labor Collective Agreements

University of Virginia

LL.M. (1972)

Yale University

J.S.D. Candidate

--Ford Foundation Fellowship, in residence 1973-1975

--Articles Editor, 3 *Yale Studies in World Public Order* (1976-1977),  
now *Yale Journal of International Law*

### Teaching Positions

Law Foundation Professor, University of Houston Law Center (1996- )

Co-Director, International Law Institute (1997- )

Professor of Law (1979-1996)

Associate Professor of Law (1975-1978)

(teaching: International Law; International Criminal Law; Seminar: Foreign Affairs and the Constitution; Seminar: Human Rights; Seminar: Use of Force, Terrorism, Laws of War). UH Law Alumni Association Faculty Distinction Award (2003)

Edward Ball Eminent Scholar University Chair in International Law, Florida State

University College of Law (spring 1997)

(taught: International Law, Human Rights)

Fulbright Professor, University of Salzburg (Austria)

Institut für Völkerrecht und Ausländisches Öffentliches Recht (1978-1979)

(taught: faculty seminar in American Jurisprudence and International Law, attended by international law and philosophy faculty from the Universities of Salzburg and Graz)



Visiting Associate Professor, Indiana University School of Law (Bloomington)  
(1976-1977) (taught: Human Rights, Jurisprudence, Property)

Faculty, International & Comparative Law, United States Dep't of Army JAG  
School (Jan. 1969-Jan. 1973) (CPT, U.S. Army)  
50th Basic Class (1969)  
#1 International & Comparative Law; Commandant's List  
Outstanding Educator of America Award (1972)  
technical adviser on Dep't of Army films and materials upgrading law of  
war training  
Mobilization Designee (1973-1975)

## **Publications**

### **Books**

1. J. Paust & A. Blaustein, *War Crimes Jurisdiction and Due Process: A Case Study of Bangladesh* (1974); extracts reprinted at *The Military in American Society--Cases and Materials* 6-17 to 6-21, 6-46 (D. Zillman, A. Blaustein, E. Sherman, *et al.*, eds., Matthew Bender 1978), and 11 *Vanderbilt Journal of Transnational Law* 1-38 (1978), cited in *The Prosecutor v. Dusko Tadic*, No. IT-94-1-T, International Tribunal for the Former Yugoslavia (1995)
2. J. Paust & A. Blaustein, *The Arab Oil Weapon* (Oceana/Sijthoff 1977)
3. editor, Chapter 6, The Law of Armed Conflict, in *The Military in American Society--Cases and Materials* 6-1 to 6-100 (Matthew Bender 1978)
4. class materials for Constitutional Jurisprudence (photo-offset)
5. J. Paust, *International Law as Law of the United States* (Carolina Academic Press, 2 ed. 2003) (1 ed. 1996)
6. J. Paust, M.C. Bassiouni, *et al.*, *International Criminal Law--Cases and Materials* (Carolina Academic Press 1996); *Teachers' Manual* (1997); *International Criminal Law--Cases and Materials* (2 ed. 2000); *Documents Supplement* (2000); *Teachers' Manual* (2001)
7. J. Paust, J. Fitzpatrick, J. Van Dyke, *International Law and Litigation in the U.S.* (West Group, American Casebook Series 2000); *Documents Supplement* (West Group 2000); *Teacher's Manual* (West Group 2000); Updates on Westlaw, TWEN
1. J. Paust, M.C. Bassiouni, *et al.*, *Human Rights Module: Crimes Against Humanity, Genocide, Other Crimes Against Human Rights, and War Crimes* (Carolina Academic Press 2001) (with Documents Section)

### **Articles, Book Chapters, and Essays**

1. Legal Aspects of the My Lai Incident: A Response to Professor Rubin, 50 *Oregon Law Review* 138-152 (1971), reprinted at III *The Vietnam War and International Law* 359-378 (ASIL 1972)
2. After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts, 50 *Texas Law Review* 6-34 (1971), reprinted at IV *The Vietnam War and International Law* 447-475 (ASIL 1976), cited in *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995)
3. My Lai and Vietnam: Norms, Myths and Leader Responsibility, 57 *Military Law Review* 99-187 (1972), cited in *United States v. Calley*, 46 CMR 1131, 1183 (1973); extract reprinted at *The Military in American Society--Cases and Materials* 6-42 to 6-44, 6-70 to 6-73 (Matthew Bender 1978), and Superior Orders and Command Responsibility, in III *International Criminal Law: Enforcement* 73-88 (M.C. Bassiouni ed. 1987), and I *International Criminal Law: Crimes* 223-237 (M.C. Bassiouni ed., 2 ed. 1999)
4. Law in a Guerrilla Conflict: Myths, Norms and Human Rights, 3 *Israel Yearbook on Human Rights* 39-77 (1973)
5. Human Rights, Human Relations and Overseas Command, 3 *Army Lawyer* 1-5 (Jan. 1973)
6. letter, command responsibility, 26 *Naval War College Review* 103-107 (Feb. 1973)
7. The Nuclear Decision in World War II -- Truman's Ending and Avoidance of War, 8 *International Lawyer* 160-190 (1974)
8. An Approach to Decision with Regard to Terrorism; and Selected Terroristic Claims Arising from the Arab-Israeli Context, symposium, 7 *Akron Law Review* 397-421 (1974)
9. Terrorism and the International Law of War, 64 *Military Law Review* 1-36 (1974), reprinted at 14 *Revue de Droit Penal Militaire et de Droit de la Guerre* 13-49 (Brussels 1975)
10. The Arab Oil Weapon: A Threat to International Peace, 68 *American Journal of International Law* 410-439 (1974) (with A. Blaustein), reprinted at *Economic Coercion and the New International Economic Order* 123-152 (R. Lillich ed. 1976), *The Arab-Israeli Conflict* 391-420 (J. Moore ed. 1977), and *The Arab Oil Weapon* 67-96 (1977); extracts reprinted at 120 *Congressional Record*, no. 10, at E392-E394 (Feb. 4, 1974), and 26/27 *Middle East Information Series* 83-89 (spring/summer 1974)
11. letter, Some Thoughts on "Preliminary Thoughts" on Terrorism, 68 *American Journal of International Law* 502-503 (1974)
12. An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis, 1 *Yale Studies in World Public Order* 148-218 (1974)
13. comment, Weapons Regulation, Military Necessity and Legal Standards: Are Contemporary Department of Defense "Practices" Inconsistent with Legal Norms?, 4 *Denver Journal of International Law and Policy* 229-235 (1974)

14. paper and remarks, symposium, *International Terrorism* 53-62, 137-138, 142 (Canadian Council of International Law, Ottawa 1974)
15. see misc. # 9
16. A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment and Cooperative Action, 5 *Georgia Journal of International and Comparative Law* 431-469 (1975)
17. Human Rights and the Ninth Amendment: A New Form of Guarantee, 60 *Cornell Law Review* 231-267 (1975), cited in 573 F.2d 1268, 1279 (Temp. Em. Ct. App. 1978), reprinted at P. Murphy (ed.), *The Bill of Rights and American Legal History* chpt. VII (1990) (representing "the best scholarship in the burgeoning Bill of Rights' literature" throughout U.S. history)
18. Constitutional Prohibitions of Cruel, Inhumane or Unnecessary Death, Injury or Suffering During Law Enforcement Process, 2 *Hastings Constitutional Law Quarterly* 873-892 (1975)
19. letter, The Arab Oil Weapon--A Mild Response to a "Skeptic," 69 *American Journal of International Law* 637-639 (1975) (with A. Blaustein), reprinted at *Economic Coercion and the New International Economic Order* 199-201 (R. Lillich ed. 1976)
20. see misc. # 11
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24. letter, Mayaguez, 86 *Yale Law Journal* 207-213 (1976)
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28. letter, human rights, 71 *American Journal of International Law* 508-511 (1977)
29. letter, Article 2(7), UN Charter, 71 *American Journal of International Law* 749-750 (1977)
30. see misc. # 20

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52. Controlling Prohibited Weapons and the Illegal Use of Permitted Weapons, symposium, 28 *McGill Law Journal* 608-627 (Canada 1983)
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55. see misc. # 42
56. see misc. # 43
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64. see misc. # 52
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70. Constitutional Limitations on Extraterritorial Federal Power: Persons, Property, Due Process and the Seizure of Evidence Abroad, in *International Criminal Law: A Guide To U.S. Practice and Procedure* 449-479 (V. Nanda & M.C. Bassiouni eds., P.L.I. 1987)
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84. Suing Saddam: Private Remedies for War Crimes and Hostage-Taking, 31 *Virginia Journal of International Law* 351-379 (1991)
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90. See misc. #95
91. See misc. #97
92. Correspondence, 87 *American Journal of International Law* 592-594 (1993)

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98. The Human Right to Die With Dignity: A Policy-Oriented Essay, 17 *Human Rights Quarterly* 463-487 (1995)
99. Declarations of War and the Peace Power, Chpt. XIV in *International Law as Law of the United States* 439-468 (1996)
100. See misc. #114
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102. Women and International Criminal Law Instruments and Processes, in 2 *Women and International Human Rights Law* 349-372 (Kelly D. Askin & Doreen M. Koenig eds., 2000)
103. See misc. #121
104. Correspondence, 91 *American Journal of International Law* 90-92 (1997)
105. Suing Karadzic, 10 *Leiden Journal of International Law* 91-98 (1997)
106. See misc. #123
107. "Equal Treaty Rights" Under the Texas Open Forum Act, 60 *Texas Bar Journal* 214-220 (March 1997)
108. See misc. #125
109. Race-Based Affirmative Action and International Law, 18 *Michigan Journal of International Law* 659-677 (1997)
110. The Preparatory Committee's "Definition of Crimes"--War Crimes, 8 *Criminal Law Forum* 431-444 (1997)
111. The Human Rights to Food, Medicine and Medical Supplies, and Freedom from Arbitrary and Inhumane Detention and Controls in Sri Lanka, 31 *Vanderbilt Journal of Transnational Law* 617-642 (1998)
112. Customary International Law in the United States: Clean and Dirty Laundry, 40 *German Yearbook of International Law* 78-116 (1998)
113. Commentary on the Intersessional Report of the Preparatory Committee for an International Criminal Court: Crimes Within the Jurisdiction of the Court, Leader Responsibility and Superior Orders, in *Observations on the Consolidated ICC Text Before the Final Session of the Preparatory Committee* 27-42 (Leila Sadat Wexler & M. Cherif Bassiouni eds. 1998)
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115. See misc. #130
116. *Breard* and Treaty-Based Rights Under the Consular Convention, 92 *American Journal of International Law* 691-697 (1998)
117. Non-Extraterritoriality of "Special Territorial Jurisdiction" of the United States: Forgotten History and the Errors of *Erdos*, 24 *Yale Journal of International Law* 305-328 (1999), cited in *United States v. Gatlin*, 216 F.3d 207, 214-214, 222 (2d Cir. 2000); *United States v. bin Laden, et al.*,

- 92 F. Supp.2d 189, 212-213, 214 n.41 (S.D.N.Y. 2000); *United States v. Corey*, 232 F.3d 1166, 1189-91 (9<sup>th</sup> Cir. 2000) (McKeown, J., dissenting)
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119. remarks, 90 *Proceedings, American Society of International Law* 273, 544, 611 (1996)
120. visiting lectures on international law and the domestic legal process at the Mexican Ministry of Foreign Relations (Polanco and Tlatelolco), the Instituto Matias Romero de Estudios Diplomaticos, and the Universidad Nacional Autonoma de Mexico, Mexico City, May 20-21, 1996
121. presentations on international criminal law, Institute of the American Association of Law Libraries, Contemporary Practice of Public International Law, Indiana University, Bloomington, July 18, 1996, paper, *International Criminal Law: Introductory Themes*, in *Contemporary Practice of Public International Law* 165-188 (E.G. Schaffer & R. Snyder eds. 1997)
122. chair, panel, *International Human Rights and Humanitarian Law After Bosnia*, annual meeting of the International Law Association, New York, Nov.1, 1996
123. paper, "It's No Defense: *Nullum Crimen*, International Crime and the Gingerbread Man," Albany Law School, November 7, 1996, printed at 60 *Albany Law Review* 657-679 (1997), extract reprinted at *The International Criminal Court*, 13 *Nouvelles Etudes Penales* 275-288 (1997) and 25 *Denver Journal of International Law and Policy* 321-332 (1997)
124. chair, panel, *Effectuating International Criminal Law through International and Domestic Fora: Realities, Needs and Prospects*, annual meeting of the

- American Society of International Law, April 11, 1997, printed at 91 *Proceedings, American Society of International Law* 259 (1997)
125. paper, "Domestic Influence of the International Court of Justice," University of Denver College of Law, April 19, 1997, printed at 26 *Denver Journal of International Law and Policy* 787-805 (1999)
  126. organized special networking session on Affirmative Action, International Law and Law School Admissions, annual meeting of the Association of American Law Schools, Jan. 9, 1998
  127. affidavit filed in *United States v. Corey*, Cr. No. 96-01019 DAE (D. Haw. 1998)
  128. affidavit filed in *United States v. Haywood*, No. 97-945-CR-MOORE (S.D. Fla. 1998)
  129. moderator, Third Annual Houston Law Review Frankel Lecture panel on Obedience to International Law, April 9, 1998
  130. panel member, paper, "The Permissibility of Affirmative Action in Higher Education Under Human Rights Law," CUNY School of Law, May 2, 1998, printed at 3 *New York City Law Review* 91-103 (1998)
  131. revised the Am. Branch, I.L.A. Committee on a Permanent International Criminal Court Draft Statute for the ICC sections on crimes, leader responsibility, and superior orders (May 1998), printed at 13 *ter Nouvelles Etudes Penales* 4-24 (1998)
  132. prepared portions of plaintiffs'-respondents' brief in *Dubai Petroleum Company, et al. v. Kazi, et al.*, before the Texas Supreme Court (May 18, 1998), and argued before the Court, Sept. 10, 1998—8-0 decision reported at 12 S.W.3d 71 (Tex. 2000)
  133. panel member and moderator, panels on International Humanitarian Law, Third Pan-European International Relations Conference and Meeting with the International Studies Association, Vienna, Austria, Sept. 18-19, 1998; "Crimes Within the Limited Jurisdiction of the International Criminal Court," printed at *International Humanitarian Law: Origins and Prospects* (J. Carey & R.J. Pritchard eds. 2002)
  134. speech, Human Rights Treaties in the U.S., UNA-USA United Nations Day celebration, Oct. 24, 1998, Albuquerque, New Mexico
  135. speech, Use of the U.N. Charter, the Universal Declaration, and Human Rights Treaties as Law of the United States, UNA-USA and Southern Illinois University U.N. Day celebration, Nov. 2, 1998
  136. chair, panel, The 50th Anniversary of the Genocide Convention, annual meeting of the American Branch of the International Law Association, New York, Nov. 14, 1998
  137. United Nations Consultative Expert Group meeting on International Norms and Standards Relating to Disability, U.C. Berkeley School of Law, Dec. 8-12, 1998; Report of the Expert Group located at [www.un.org/esa/socdev/disberk0.htm](http://www.un.org/esa/socdev/disberk0.htm)
  138. moderator, Coif Lecture and Conference on Legal Responses to International Terrorism, University of Houston, March 12, 1999

139. speech, Incorporation of International Law, Cornell Law School, March 16, 1999
140. panel member, International Criminal Court: Views from Rome, annual meeting of the American Society of International Law, March 25, 1999, remarks in 93 *Proceedings, American Society of International Law* 73-74 (1999)  
short essay, NATO's Use of Force in Yugoslavia, 33 *U.N. Law Reports* no. 9, at 114-16 (J. Carey ed. May 1999), also at 2 Translex, Transnational Law Exchange, special supp. 2-3 (May 1999)  
participant re: Report on Proposed Guiding Principles for Combating Impunity for International Crimes (1999)  
participant in creation of Draft Provisions for an International Protocol on Rights of Persons With Disabilities, Human Rights Committee, American Branch, International Law Association, June 1999–revised as Draft Convention on Rights of Persons With Disabilities, March, 2000  
speaker, laws of armed conflict, genocide, and Kosovo, American Red Cross, Austin, Texas, May 24, 1999  
panel member, United Nations International Meeting on the Convening of a Conference on Measures to Enforce the Geneva Conventions in the Occupied Palestinian Territory, Cairo, Egypt, June 14-15, 1999; paper “Applicability of Geneva Law and Other Laws of Armed Conflict to Protection of Civilians in the West Bank, Gaza and East Jerusalem,” extracts printed in UN Press Release GA/PAL/806 (June 1999) and 33 *U.N. Law Reports* no. 11, at 163-164 (1 July 1999)  
lectures and seminar, Protection of Civilians in Times of Armed Conflict, 27<sup>th</sup> Annual Session: The Law of Armed Conflict, Institute of International Public Law and International Relations, at Aristotle University, Thessaloniki, Greece, Sept. 13-17, 1999, to be printed in the Institute's *Thesaurus Acroasium* (2000); speech on NATO and Intervention in Kosovo, at the U.S. Consulate, Thessaloniki, Greece, Sept. 16, 1999  
guest editorial, Questions Concerning the Final Report to the Prosecutor Regarding NATO Bombings, 34 *U.N. Law Reports* no. 11, at 132-134 (1 July 2000)  
keynote speech, International Law as Law of the United States: Trends and Prospects, Japanese American Society for Legal Studies symposium, Sept. 17, 2000, University of Tokyo, Japan, printed in Japanese at *Journal of the Japanese American Society for Legal Studies* 13-38 (2001), reprinted in English at 2 *Chinese Journal of International Law* 615-646 (2002)  
speech, Problematic U.S. Sanctions Efforts in Response to Genocide, Crimes Against Humanity, War Crimes, and Other Human Rights Violations, Sept. 18, 2000, Waseda University, Japan, printed at 3 (2000) *Waseda Proceedings of Comparative Law* 95-119 (2001)  
speech, Sept. 22, 2000, Law Faculty Colloquium, University of Tokyo, Japan  
panel member, Economic and International Institutions, and discussion

leader, AALS Workshop on Human Rights, Washington, D.C., Oct. 28, 2000

paper, Universal Jurisdiction, Universal Responsibility, and Related Principles of International Law, Princeton Project on Universal Jurisdiction, Princeton University, Nov. 9-11, 2000, printed at (Princeton University Press 2001)

key note speech, U.S. Dep't of State sponsored conference with the Iraqi National Congress on Transitional Justice and the Practical Application of Human Rights Advocacy in Iraq, London, England, March 23-24, 2001

panel member, The U.S. Lawyer-Statesman at Times of Crisis: Francis Lieber, and panel member, Universal Jurisdiction Under International Criminal Law: Trends and Prospects, annual meeting of the American Society of International Law, Washington, D.C., April 6-7, 2001, first paper printed at 95 *Proceedings, American Society of International Law* 112-115 (2001)

panel member, Transnational Corporations and Human Rights in Africa, A.B.A. Section of International Law and Practice meeting, Washington, D.C., April 27, 2001

panel member, Addressing Violations of International Law by Non-State Actors, annual meeting of the American Branch of the International Law Association, New York, Oct. 27, 2001; paper "Sanctions Against Non-State Actors for Violations of International Law," printed at 8 *ILSA Journal of International & Comparative Law* 417-429 (2002)

panel member, paper, "The Right to Life in Human Rights Law and the Law of War," University of Saskatchewan College of Law, Nov. 3, 2001, printed at 65 *Saskatchewan Law Review* 411-425 (2002)

presenter, National Workshop for District Judges II, sponsored by the Federal Judicial Center, San Diego, California, Dec. 3-5, 2001

panel member, Use of Force in the Aftermath of September 11<sup>th</sup>, Cornell Law School, Feb. 14, 2002; paper "Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond," printed at 35 *Cornell International Law Journal* 533-557 (2002)

panel member, Inside the International Criminal Court, University of Houston Law Center, Feb. 22, 2002

panel member, The Definition of Aggression and the ICC, and moderator, panel on The Judicial Response to Terror, annual meeting of the American Society of International Law, Washington, D.C., March 15, 2002, remarks printed at 96 *Proceedings, American Society of International Law* 190-92, 250 (2002)

speech on antiterrorism military commissions, Penn State University Dickinson School of Law, March 28, 2002

prepared Memorandum *Amicus Curiae* of Law Professors in United States v. John Walker Lindh, 212 F. Supp.2d 541 (E.D. Va. 2002)

affidavit filed in Jane Doe I, Jane Doe II, Petit, *et al.* v. Liu Qi, *et al.*, F. Supp.2d (N.D. Cal. 2002)

affidavit prepared in *People of the State of California v. Romero Vasquez*,  
 Sup. Ct., Santa Barbara, July 2002  
 participated in *Amici* brief, *Habib v. Bush* (No. 02-5284), decided with *Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003)  
 lecture, Use of Military Force Against Iraq, Coférence D'Actualité,  
 University of Paris X, France, Nov. 12, 2002  
 panel member, Detention and Due Process Under International Law,  
 Conference on Terrorism and the Military: International Legal Implications,  
 Societe Internationale de Droit Militaire et de Droit de la Guerre, sponsored  
 by the Netherlands Ministry of Defense, The Hague, Netherlands, Nov. 14-  
 15, 2002, paper printed at *Terrorism and the Military: International Legal  
 Implications* 181-196 (W.P. Heere ed. 2003)  
 co-speaker, Civil Liberties: From Nuremberg to Houston, Holocaust  
 Museum Houston, Nov. 19, 2002  
 panel member, 9-11 and Its Aftermath, International Law Weekend West, at  
 Loyola Law School, Los Angeles, Feb. 7, 2003  
 panel member, symposium on The Judiciary and the War on Terror, at  
 Tulane University School of Law, Feb. 21, 2003  
 presenter, CLE program of the Louisiana Trial Lawyers Association on  
 9/11: the War at Home, Civil Rights and Civil Liberties in the U.S. Post  
 9/11, at Loyola University School of Law, Mar. 21, 2003  
 panel member, Legal Responses to Terrorism: Security, Prosecution and  
 Rights, annual meeting of the American Society of International Law, Apr.  
 3, 2003, paper "Detention, Judicial Review of Detention, and Due Process  
 During Prosecution, 97 *Proceedings, American Society of International Law*  
 13-18 (2003)  
 prepared Memorandum *Amicus Curiae* of Law Professors in *Padilla v.  
 Rumsfeld*,  
 Second Circuit Court of Appeals (July 2003)  
 panel member, International Terrorism and International and European  
 Criminal Law, Hague Joint Conference on Contemporary Issues of  
 International Law - 2003, The Hague, Netherlands, Jul. 5, 2003; paper,  
 "International Law Concerning Domestic Prosecutions of al Qaeda  
 Attacks," *From Government to Governance* 360-369 (2003)  
 panel member, International Conference on the United Nations and Taiwan,  
 New York, N.Y., Sept. 5, 2003, paper, "U.N. Principles in Theory and  
 Practice: Time for Taiwanese Self-Determination to Ripen into More  
 Widely Recognized Statehood Status and Membership in the U.N.?, to be  
 printed in a book  
 panel member, International Criminal Justice and Asia, Japanese Society of  
 International Law International Symposium, Unity in Diversity: Asian  
 Perspectives on International Law in the 21<sup>st</sup> Century, Nagoya, Japan, Oct.  
 11-12, 2003, paper, "U.S. Schizophrenia With Respect to Prosecution of  
 Core International Crimes," to be published in a book; updated version at  
*Japanese Society of International Law Journal* (2004)

panel member, History of International Tribunals, ILSA Conference on International Criminal Law: The Expansion of Individual Rights and Responsibilities for Human Rights Violations, Loyola Law School, New Orleans, Oct. 18, 2003, paper, "Selective History of International Tribunals and Efforts Prior to Nuremberg," printed in 10 *ILSA Journal of International & Comparative Law* 207-213 (2004)

panel member, Civil Liberties and the War on Terrorism, Conference on International Justice, Wayne State University Law School, Oct. 27, 2003, paper, "After 9/11, 'No Neutral Ground' With Respect to Human Rights: Executive Claims and Actions of Special Concern and International Law Regarding the Disappearance of Detainees," to be printed in 50 *Wayne Law Review* (2004)

panel member, International Law panel, Symposium: Do We Need a New Legal Regime After September 11<sup>th</sup>?, University of Notre Dame Law School, Dec. 5, 2003, paper "Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions," to be printed in 79 *Notre Dame Law Review* 1335-1364 (2004)

panel member, panel on Contemporary Trends in International Human Rights, and Implementation of Human Rights Domestically, International Human Rights Roundtable, Taipei, Taiwan, Dec. 10, 2003, and suggestions concerning the draft Human Rights Act and the laws concerning Taiwan's Human Rights Commission; meeting with President Chen Dec. 11, 2003

panel member, The New Architecture of International Law After Iraq, annual meeting of the Association of American Law Schools, Atlanta, Georgia, Jan. 4, 2004, paper "The U.S. as Occupying Power Over Portions of Iraq and Special Responsibilities," printed in 27 *Suffolk Transnational Law Review* 1 (2004)

panel member, International Tort Litigation, International Law Section of the State Bar of Texas, Feb. 27, 2004

moderator, Conference on Civil Litigation of International Law Violations in U.S. Courts, University of Houston Law Center, Mar. 1, 2004

panel member, Non-State Actors and the Contemporary Legal Order, University of Michigan Law School, Mar. 20, 2004, paper "The Reality of Private Rights, Duties, and Participation in the International Legal Process" to be printed in 25 *Michigan Journal of International Law* (2004)

helped prepare Brief of *Amici Curiae* International Law Professors in *Hamdi v. Rumsfeld*, Supreme Court of the United States, Feb. 23, 2004

prepared Brief of *Amici Curiae* International Law Professors in *Rumsfeld v. Padilla*, Supreme Court of the United States, April 2004

on-line essay "Abuse of Iraqi Detainees at Abu Ghraib: Will Prosecution and Cashiering of a Few Soldiers Comply with International Law?," available at <http://jurist.law.pitt.edu/forum/paust1.php> and reprinted on-line at [www.nimj.org/commentary](http://www.nimj.org/commentary)

on-line essay "The Common Plan to Violate the Geneva Conventions,"



available at <http://jurist.law.pitt.edu/forum/paust2.php>

panel member, Terrorism as an International Crime, Conference on International Cooperation and Counterterrorism, Università Degli Studi di Trento, Italy, May 27-28, 2004

panel member, Military Commissions, Conference on International Law Challenges: Homeland Security and Combating Terrorism, U.S. Naval War College, June 24, 2004, paper on Military Commissions: Constitutional, Jurisdictional, and Due Process Requirements, to be published

prepared Brief of *Amici Curiae* International Law Professors in *Swift v. Rumsfeld*, District Court for the District of Columbia

Distinguished Guest Lecture at Thomas Jefferson School of Law, Oct. 18, 2004

Round Table Lecture at Tulane University School of Law, Oct. 25, 2004

panel member, Unity and Diversity With Regard to the Role of Various Subjects in the Norm-Creating and Norm-Implementing Process, University of Kiel, Nov. 5, 2004

### Other Activities

Fulbright lectures, University of Leiden, the Netherlands, June 12-13, 1979

Fulbright lectures, University of Florence, Italy, March 26-27, 1979

Faculty Advisor, *Houston Journal of International Law* (since its inception, 1978 - )

Board of Editors, on-line International Law Journal (2003- )

Board of Advisors, *Austrian Journal of Public and International Law* (1990 - )

U.S. Dep't of State Scholar-Diplomat Seminars (1973 & 1975)

National War College Conference on the Law of War (Dec. 1974)

Judge, 1972, 1978, 1980, 1981, 1985 ASIL Regional Jessup International Moot Court; Memorial Judge, 1986 ASIL Jessup Regional International Moot Court; Judge, 1996 ASIL Quarterfinals; Judge, 1998 ASIL rounds and Quarterfinals; Judge, 2001 ASIL Regional International Moot Court, final round; Judge, 2001 ASIL World final round; Judge, 2002 ASIL Regional International Moot Court, final round; Judge, 2003 ASIL Regional International Moot Court, final round; Judge, 2004 ASIL Regional International Moot Court, final round

Research and writing for J.L. Paust & R. Upp, *Business Law* (West Publishing, 1st ed. 1969) (in 4th ed. 1984)

Interviews: several local, national, and international television (including CNN, CNN Int'l), radio (including NPR), and newspaper interviews over the years

### Summer Teaching:

University of Houston (1978) (1980) (1982) (1986)

International Legal Studies, Salzburg, Austria (1979)

### Other Teaching:

International Legal Studies, Salzburg, Austria (1978)

(short course on U.S. Contracts Law for European attorneys)

guest lectures, UH Graduate School of Social Work (1994, 1995)

**Faculty Committees:**

Graduate Legal Studies (1995-1996, 1997- ), Chair (2001- 2003); Promotion and Tenure (2003 - ); Faculty Appointments (2001- ); Executive Committee (1998-2000); Library (2000-2001); Admissions (1996); Promotion & Tenure (1994-1995); Faculty Development (1993-1994); Educational Policies Committee (1994); Self-Study (1991-1992); Chair Subcommittee, Personnel (1990-1992); First Year (1991-1993); Admissions (1987-1991); Graduate Studies (1987-1988); Leave Committee (1989-1990); Curriculum (1985-1986); Self-Study & Planning (1985-1986 & 1991-1992); Personnel (1983-1985); Promotion & Tenure (1981-1983); previously: Curriculum; Chair, Library; Chair, Library-sub-committee on faculty teaching and research

University Faculty Senate (1994); University Limited Grants Committee (1993-1994); University Research Council (1983-1986)

Co-Director, International Law Institute

**Member:**

American Society of International Law

Executive (President's) Committee (1990-1991)

- Executive Council (1989-1992)
- Organizing Committee: Joint Conference of the ASIL and the Netherlands Society of International Law (1991)
- Annual Meeting Program Committee (1985-1986, 1989)
- Program Chair (1988-1989)
- Human Rights Advocacy Interest Group (founding member, 1985- )
- International Criminal Law Interest Group (founding member, 1992- )
- Co-Chair (1992- )
- Lieber Society on the Law of Armed Conflict
- Executive Committee (2004- )
- Working Group on International Terrorism (1975-1977)
- American Branch, International Law Association
  - Working Group on U.S. Ratification of Geneva Weapons Protocol (1980-1982)
  - Working Group on U.S. Ratification of Geneva Protocols (1979-1980)
  - Committee on Human Rights (1983- )
  - Committee on International Law in Domestic Courts (1992-1999)
  - Committee on a Permanent International Criminal Court (1996-1999)
  - Committee on International Terrorism (1983-1990)
  - Committee on Armed Conflict (1978-1983)
- American Bar Association, Section on International Law
  - Committee on International Law and the Use of Force (1975-1978)
  - Chair (1975-1978)
  - Human Rights Committee (1974)
  - Task Force on Teaching International Criminal Law (1993-1994)
  - Task Force on Proposed Protocols of Evidence and Procedure for Future War Crimes Tribunals (1994-1996)
- American Section, Association Internationale de Droit Penal
  - Board of Director (1993- )
- Association of American Law Schools
  - Chair, Section on International Law (1991-1993)
  - Chair-elect, Section on International Law (1990)
  - Secretary, Section on International Law (1989)
  - executive committee, Section on International Law (1982-1985, 1987, 2001, 2003, 2004)
  - nominating committee, Section on International Law (1980)
- Center for Human Rights and Constitutional Law
  - Legal Advisory Committee, South Africa Constitution
  - Watch Commission (1991-1992)
- Human Rights Advocates, International, Board of Directors (1979- )
- Human Rights Law Group
  - Co-Director, Houston Affiliate (1980-1984)
- Independent Commission on Respect for International Law (1985-1988)
- Legal Scholars for Human Rights (Venice, Italy)
  - Advisory Board
- Transnational Publishers Advisory Board for the International and Comparative Law Series (2000-)

United Nations Association-USA

Board of Directors, Houston Chapter (1978-1981)

adviser on Houston Area Model U.N. I.C.J. program for high school students  
(since its inception, 1980-1995) and resource speaker most years

**International Arbitrator**

Panel Member, International Centers for Arbitration

I.C.A. Certification Course for International Arbitrators (May-June 1993)

**Admitted to the Bar**

Supreme Court of California (1969)

Federal District Court, Central District of California (1969)

United States Court of Military Appeals (1969)

United States Court of Appeals for the District of Columbia (1980)

United States Court of Appeals for the Fifth Circuit (1998)

United States Court of Appeals for the Seventh Circuit (2004)

United States Supreme Court (1980)

International Court of Justice (1994) (see misc. #104)

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| UNITED STATES OF AMERICA | ) | PROSECUTION RESPONSE TO |
|                          | ) | DEFENSE REQUEST FOR     |
| v.                       | ) | WITNESS: JORDAN PAUST   |
|                          | ) |                         |
| SALIM AHMED HAMDAN       | ) | 25 October 2004         |
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The Prosecution in the above-captioned case hereby files the following response and notification of intent not to produce in accordance with paragraph 6 of POM 10. In support of this response, the Prosecution answers the Defense’s Request for Witness as follows:

1. Response to paragraph 2. The Prosecution has no objections or supplements to this paragraph.
2. Response to paragraph 3. The Prosecution does not contest the content of the proffer. However, the Defense must assert why the witness’ *testimony* will be relevant.

a. Specific Objections.

To the extent that Professor Paust will testify about the applicability of the Geneva Conventions or other international law, his testimony is cumulative with that of Professor Slaughter by the Defense’s own pleadings.

Professor Paust’s testimony that the Commission does not have jurisdiction because is not located within a theater of war or within a war-related occupied territory is not relevant because the Defense has made no motion proposing this theory as a grounds for dismissal or any other relief.

Finally, although Professor Paust claims to be willing to testify that the President’s Military Order and the DOD Rules of Procedure set forth in MCO No. 1 do not comply, the relevance is not demonstrated because the Defense does not allege what they do not comply with.

b. General Objections.

Most of the motions pending before this Commission are motions on purely legal matters. It is the function of the written motion to define the law as it applies to one's case and to then supplement this written motion with oral argument that can also be responsive to any particularized questions of the finders of law. Expert witnesses are not needed for this purpose. To the extent that experts in the field have written on an issue that is the specific subject of a motion, that article can be cited and even appended to the motion. If the legal-expert has experience and understanding of the subject matter of the motion but has not written specifically on the topic, that expert can be approached as a consultant to a party and can help construct the brief and the oral argument.

The Defense has clearly demonstrated the capability to argue their legal theories. There appears to be a great danger in permitting this expert testimony. The Defense in their witness request for Professor Paust stated his views are "authoritative on the questions raised in these motions." It is clear that the Defense sees this expert serving in a quasi-judicial function, not allowed in any court of law, court-martial, or military commission. This statement alone shows the danger that this witness may usurp the authority of the Commission in determining what the law is.

Finally, while we appreciate the Defense's concern that the Commission may need further assistance in understanding the law beyond the initial arguments that the counsel assigned to this case can provide, we do not feel that using the Defense's hand-picked experts are the solution. In voir dire, the Presiding Officer stated that should questions of the Commission desire greater assistance in understanding a question of law, he would permit counsel for both sides to present their views on the matter to the Commission to assist in getting the Members the additional help they desire. (Transcript page 23). Defense stated in voir dire that the Commission members will have to carefully study "international treaties, the customs and practice as established by military regulations, handbooks, and international cases throughout the world, as well as the Constitution of the United States, federal judicial opinions and federal statutes." See Hamdan transcript, page 42. Defense asked if the members were up to the task and they replied that they were. Until such time as the members claim to be unable to determine the law despite reading of the parties' briefs, hearing the parties' oral argument, and conducting their own research, expert testimony is neither relevant nor helpful.

3. Response to paragraph 4. The Prosecution has no objections or supplements to this paragraph.
4. Response to paragraph 5. The Defense proffer in paragraph 3 of the request does not address how the testimony proffered is relevant to the motions for which Professor Paust is being requested. Even the supplemental proffer does not appear to specifically address UCMJ Article 10's applicability or the motion to abate the proceedings.
5. Response to paragraph 6. If Professor Paust is deemed to be a necessary witness, we do not object to his testimony being taken over the telephone.
6. Response to paragraph 7. See paragraph (6) above.

7. Response to paragraph 8. The Defense states that “No other witness can be called to attest to the relationship between American military justice and military commissions.” His testimony would seem to overlap however extensively with the proposed testimony of Professor Danner, Dean Slaughter and Professor Ackerman.

8. Response to paragraph 9. Paragraph 9 of the Defense request is not compliant with POM 10. POM 10, paragraph 4i requires that the Defense state the law that requires the production of this witness.

9. Conclusion. The Prosecution has a motion pending before the Commission, the decision of which would affect the production of this witness. Therefore, the Prosecution requests that the Commission defer its ruling on this issue until the Motion is decided. If the pending Motion is decided in favor of the Defense, the Prosecution still requests that the production of this witness be denied. From the proffer, it is clear that the Defense had consulted with the witness and has obtained the value of her input. If they have not used this value in their motions to date, they can do so in their replies<sup>1</sup> or in oral argument. While live “law expert” witness testimony may add to the media attention dedicated to these proceedings, there has been no showing as to why the briefs and oral arguments of the parties assigned to this case are insufficient.

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Commander, U.S. Navy  
Prosecutor

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<sup>1</sup> On 21 October, the Defense requested a delay in filing replies to the Prosecution’s responses to their motions. They now have plenty of time to incorporate whatever they have learned from these experts into their replies.

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|                          | ) | DEFENSE REPLY TO        |
| UNITED STATES OF AMERICA | ) | PROSECUTION RESPONSE TO |
|                          | ) | DEFENSE REQUEST FOR     |
| v.                       | ) | WITNESS: JORDAN PAUST   |
|                          | ) |                         |
| SALIM AHMED HAMDAN       | ) | 27 October 2004         |
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1. Reply regarding paragraph 3. The prosecution continues its blatant attempt to hide relevant law, as well as testimony about the history of the law, from the commission through this legal maneuver. The Defense has explained, in detail, precisely why the witness' *testimony* will be relevant. We have detailed precisely why this commission must hear from Professor Paust, who has served as a JAG officer to study military commissions during the Vietnam War, as well as a scholar of International Law with a special expertise in military commissions.

As the supplemental material makes clear, Professor Paust has published work that bears on these questions, but has not applied that work to this specific prosecution. That is the function of his testimony, and for this reason, merely incorporating his past work into a defense brief of some kind would not be appropriate. Indeed, everyone would expect that a move like that would be resisted by the Prosecution precisely on grounds of relevance. And it makes absolutely no sense why testimony can be admitted in one form (like writing), but not another (live).

Incorporation of Professor Paust's work into a defense brief is inappropriate for a second reason, because he is not in any way a defense counsel. The whole function of experts about the meaning of the law is precisely to make sure that the relevant conclusions can be cross examined by both sides. Barring that testimony in lieu of some submission alongside a brief would make such examination impossible.

The Prosecution provides not a *single* case in which a mixed body of lawyers and nonlawyers has *ever* rejected expert testimony about the law. The Prosecution is simply making up a legal rule by taking precedents from other institutions when the very rules of evidence that govern *this* commission are different. Even under Federal Rule 702, which governs courts where the responsibility for deciding fact and law are separated, courts admit the testimony of law professors all the time. The prosecution cites irrelevancies about the *Yamashita* case and tries to make an argument about how expert testimony is not relevant. Nothing could be farther from the truth: the testimony goes to the very heart



of the motions being decided by the commission. And because this commission is the trier of both fact and law under the President's Order, the testimony is not only important, it is essential. It would constitute reversible error for the commission to proceed without it.

Unable to marshal even one case to support their bizarre contention, the Prosecution must resort to mischaracterizing the defense's request, asserting that somehow an expert will "usurp the authority of the Commission" and serve "a quasi-judicial function." Nothing could be further from the truth. The function of an expert is to illuminate the law and to explain the history behind it. It is NOT to decide it. In several previous filings with this commission, we have explained that the role of an Expert is confined in this way.

The prosecution is free to cross examine an expert witness, to explain why they believe the expert is wrong, and to present witnesses of their own in compliance with commission rules. But to say that the witness must be excluded because his views will decide the matter for the commission is not only premature, it is wrong. The testimony will do nothing more than explain his view of what the law is and why it looks that way. The commission is of course free to disregard the views of the expert at any point. That is precisely why, in voir dire, the Defense made sure that the commission was willing to hear arguments based upon international law. The fact that the Members have agreed to be willing to hear and decide these matters militates *for* the testimony (not against it, as the Prosecution contends in its papers), because it shows both the relevance of the testimony as well as the stated capability of the Commission to decide these matters.

Professor Paust's testimony about the theatre of war is directly relevant to the motion to dismiss for lack of legislative authority. Indeed, the Defense has relied on Professor Paust's articles in that motion for this specific point.

Professor Paust's testimony in international law is in no way cumulative with Dean Slaughter's. Dean Slaughter will explain, from the perspective of the leading American academic on international law, why the Prosecution has violated the laws of war. Professor Paust, by contrast, will explain, from the standpoint of a former JAG officer, the history of the Geneva Conventions and why they look the way they do.

For these reasons, his testimony is not cumulative with that of any other witness.

2. Response to paragraph 7. The defense has explained the relevance of the testimony, as well as why live testimony is greatly needed. Without live testimony, the impact of the witness will be much diminished, and the witness' ability to react to questions posed by both sides in the motion argument will be weakened considerably. The Defense did not ask for a delay in the Proceeding to accommodate the Professor's testimony and as such did not present alternatives.

3. Response to paragraph 8. The testimony of Professor Paust is not cumulative with any other witness. Professor Paust brings his military experience to light as an expert in

military commissions. No other witness will testify as to the matters that he will discuss. Furthermore, the appropriate test is whether the expert has the expertise sought and whether the testimony is relevant to the subject, not whether he is the only possible expert. The defense notes that the Professor is not being paid for the testimony and as such whether a suitable alternative is available is not at issue.

4. Response to paragraph 9. The Defense request easily complies with POM 10. The defense has cited numerous cases where expert testimony has been admitted and been found helpful in helping the legal institution decide what the law is and why it looks the way it does. To deny it would be in violation of the President's Order, which requires a "full and fair trial."

The defense agrees that the Prosecution's motion to preclude the testimony of the defense experts, if granted by the Commission as a whole, would be dispositive on the issue. Unless and until that occurs, however, there is no reason to prevent this testimony from going forward. Indeed, the Prosecution offers no explanation of how, if the Commission's full membership were to rule against the Prosecution's motion to preclude the testimony of the experts, there would be any basis to preclude Prof. Paust's production, particularly when the standard for testimony and evidence is probative to a reasonable person.

It is notable that the Prosecution seeks to enter, on the *merits*, evidence under this very evidentiary standard that would not be admissible in any court in America. It then, under the *very same standard*, tries to bar the Defense the opportunity to enter relevant expert testimony on a *motion*. This is a wrongheaded move, one can only taint the fairness of these proceedings.

Indeed, the failure to produce Prof. Paust when the Commission as a whole has not ruled on the matter is a calculated and clear attempt to influence the Commission's decision by requiring the Commission to delay the proceedings to obtain the testimony. Given that two of the Commission members remain responsible for their normal duties during the disposition of the Commission and that proceedings may only be heard in Guantanamo, delay requires these Commission members to suffer additional disruption in their work and personal lives if they were to rule in favor of the Defense. As such production of the witness is appropriate in order not to prejudice or appear to prejudice the Commission's decision.

6. Conclusion. The testimony of this expert is essential in giving the commission a fair picture about the complexity and history behind the issues being decided by the commission. Even the Prosecution has not provided a single precedent that *prohibits* the testimony of this expert. To the contrary, similar testimony is given in federal courts all the time. Indeed, the case for such testimony is far stronger here. Given the particular nature of (a) these claims and (b) this type of proceeding (commission composed of non-lawyers with a more lenient evidentiary standard) it is pragmatically advisable to let this expert testify.

Finally, the Defense insists that the full membership of the Commission rule on this matter in a written opinion with reasons. In particular, the opinion should address the following two questions in explaining why the witness will or will not be produced: Is this expert's testimony permissible under the rules of the commission? If not, how can such a decision can be squared with the permissive rules of evidence set by the President to govern these commissions and the fact that this is a mixed body to determine law and fact? It is unquestioned that the witness is an expert knowledge relevant to this commission's adjudication of matters before it.

We further request that this motion, and the government's response, as well as the final written decision by the full commission, be made public and part of the record in this case.

Neal Katyal  
Civilian Defense Counsel

LCDR Charles Swift  
Detailed Defense Counsel

From: XXXX. CIV (L)  
Sent: Friday, October 29, 2004 3:07 PM  
To: XXXX CIV (L); 'Swift, Charles, LCDR, DoD OGC'; 'Neal Katyal'  
Cc: XXXX, CDR, DoD OGC'; 'Swann, Robert, COL, DoD OGC'; XXXX LtCol, DoD OGC'; XXXX; XXXX, COL, DoD OGC'; XXXX, Cpt, DoD OGC'; XXXX; 'XXXX, GySgt, DoD OGC'; 'Gunn, Will, Col, DoD OGC'; Brownback, Peter E. COL (L)  
  
Subject: US v. Hamdan, Decision of the Presiding Officer, D29

United States v. Hamdan  
Decision of the Presiding Officer, D29

The Presiding Officer has denied the request for production of Jordan Paust as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

XXXX  
Assistant to the Presiding Officers  
XXXX  
Voice: XXXX  
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| UNITED STATES OF AMERICA | ) |                               |
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|                          | ) | <b>DEFENSE MOTION -</b>       |
|                          | ) | <b>THE ENTIRE COMMISSION</b>  |
| v.                       | ) | <b>TO GRANT PRODUCTION OF</b> |
|                          | ) | <b>WITNESS DENIED IN D 29</b> |
|                          | ) |                               |
| HAMDAN                   | ) | <b>JORDAN PAUST</b>           |
|                          | ) |                               |
|                          | ) | October 29, 2004              |

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The Defense previously requested that the above witness be produced. As the documents referenced below make clear, this expert is a leading scholar and law professor whose work centers on the role of military commissions in American history. Professor Paust also served as one of the individuals who examined the feasibility and constitutionality of military commissions during the Viet Nam War. The request for production of this witness was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory, in making its determination.

- a. Motion by the defense for the production of the above witness.
- b. Decision of the Presiding Officer denying the witness.
- c. The government response to this motion.
- d. The government reply to this motion.

The defense also renews its statement that this motion must be decided by the full commission, as per Section 4 (c)(2) of President Bush's Military Order dated 13 November 2001, and that the reasons for granting or denying the motion be specified in detail and in writing on the record.

By: \_\_\_\_\_  
 Neal Katyal  
 Civilian Defense Counsel